No. 79407-3

CHAMBERS, J. (concurring in dissent) — I write mainly to urge legislative intervention and clarification on an issue that is so central to our criminal justice system. It is both beyond doubt and profoundly disturbing that innocent people are convicted despite truthful witnesses, good lawyers, good juries, good judges, and fair trials. *See generally* Sophia S. Chang, Note, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 Hastings Const. L.Q. 285 (2009). Largely based on DNA (deoxyribonucleic acid) evidence, the "Innocence Project" alone has exonerated at least 223 wrongfully convicted men and women, including 17 who had been sentenced to death. *Id.* at 289.

I believe—or at least, I hope—that wrongful convictions are extraordinarily rare. But they happen, and because they happen, we should be open to the claim of error. This is especially true as we become increasingly aware of the fallibility of confessions and eyewitness testimony, but still rely so strongly on this evidence in our criminal proceedings. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 904 (2004); *Bernal v. People,* 44 P.3d 184, 190 (Colo. 2002).[1] The dangers are exacerbated when children are

[1] The Colorado Supreme Court cited research that gives us particular reason to be concerned about eye witnesses' testimony in such circumstances. As it noted:

involved, either as the witnesses or the accused. We know now that five boys under intense pressure wrongly confessed to beating and raping a woman in New York City. *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century,* 2006 Wis. L. Rev. 479, 480-85 (2006) (discussing the Central Park jogger case). We have reason to believe that, even in our own country and even in our own time, men have gone to prison and even death row on the strength of confessions wrought by torture. *See* John Charles Boger, *Foreword: Acts of Capital Clemency: The Words and Deeds of Governor George Ryan,* 82 N.C. L. Rev. 1279, 1280 n.10 (2004) (citing Abdon M. Pallasch et al., *Gov. Ryan Empties Death Row of All 167,* Chi. Sun-Times, Jan. 12, 2003, at 2). Judicial finality is a virtue but a vastly inferior one to

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> For example, a study of forty cases in which the convicted persons were later exonerated through DNA testing revealed that ninety percent (90%) of the convictions were obtained, at least in part, by erroneous eyewitness identifications. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 605 (1998). The study concluded that "mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined," and that "eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries." *Id.* The study further demonstrated that "accuracy of description is a rather poor predictor of identification." *Id*. at 608. A different study revealed that "recognition accuracy was found to be poorer when the perpetrator was holding a weapon." Vaughn Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. of Applied Social Psychology 845, 854 (1987).

Bernal, 44 P.3d at 190.

actual substantive justice.

In response to this reality, 45 states have enacted postconviction DNA testing statutes. *See* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1676 (2008). While these statutes differ in some areas, all adopt some level of outcome-based restrictions on granting relief. *Id.* The vast majority (38 of 45) require that anyone requesting DNA testing demonstrate that the test results would be "material" before testing is granted. *Id*. This materiality standard has been expressed in many states as requiring the petitioner to show "'a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing.'" *Id.* (quoting as illustrative Ariz. Rev. Stat. Ann. § 13-4240 (2001 & Supp. 2007).[2] The "reasonable probability" standard is a less stringent standard than a "preponderance of the evidence" standard. It has been defined as a "probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 669, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Crawford*, 159 Wn.2d 86, 104-05, 147 P.3d 1288 (2006) (holding that the reasonable probability

[2] There are only four states that place a higher burden on petitioners seeking DNA testing. Colorado and Texas require petitioners to show by a preponderance of the evidence that test results would prove innocence. Garrett, *supra*, at 1676 n.221 (citing Colo. Rev. Stat. § 18-1-413 (2007); Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A) (Vernon 2006)). New Hampshire and Virginia require clear and convincing evidence that testing will demonstrate innocence before testing will be granted. *Id.* n.222 (citing N.H. Rev. Stat. Ann. § 651-D:2(III) (2007); Va. Code Ann. § 19.2-327.1 (Supp. 2007)). Conversely, three states require only that the petitioner show a likelihood that DNA test results could be probative of innocence. *Id.* n.218 (citing Kan. Stat. Ann. § 21-2512 (2006); Neb. Rev. Stat. § 29-4120(5) (2006); Wyo. Stat. Ann. § 7-12-303 (effective July 1, 2008)).

standard is less stringent than the standard for newly discovered evidence claims). In my view, this materiality standard appropriately balances the desire for finality against the need for accurate results. It is consistent with federal constitutional standards requiring the State to produce evidence "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481(1985) and discussing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).

Unfortunately, the majority concludes that our legislature intended a higher standard for obtaining DNA testing than is required by most other jurisdictions. It essentially adopts our court rules standard for granting a new trial based on newly discovered evidence—a standard steeped in the doctrine of finality and not an easy standard to meet. But Alexander Riofta has not requested a new trial; he has asked only to obtain evidence that may lead to a request for a new trial. To hold Riofta to the same burden of proof before testing has taken place makes little sense if, assuming favorable test results, he will be required to make the same showing in a subsequent personal restraint petition.

The standard should allow the petitioner to obtain testing if he can show that favorable test results will *later* demonstrate innocence on a more

probable than not basis.[3] As I read the statute, only after testing has occurred is the petitioner required to show the DNA evidence will actually exonerate him. This interpretation is consistent with the legislature's desire to broaden the availability of postconviction DNA testing.

I would analyze this statute, and this evidence, against the agonizing fact that innocent people are convicted. In my view, if there is any serious reason to believe that some piece of tangible evidence could establish the innocence of the convicted man or woman, that evidence should be tested. As Judge Stephen Reinhardt put it, when there is evidence that could prove a convicted man is actually innocent, "fairness requires that on remand the state come forward with any exculpatory evidence it possesses." *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992). We should not be afraid to be proved wrong. As a people, as a state, we are better than that. We should apply these rules liberally, and we should order the evidence tested here. I concur in dissent.

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[3]While I believe the statute is clear on this point, if the legislature would like to clarify its meaning in the wake of this opinion it might wish to amend RCW 10.73.170(3) to read:

> The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown ~~the~~ any reasonable likelihood that the DNA evidence would demonstrate innocence. ~~on a more probable than not basis~~.

Such a change would make absolutely clear that the burden on a petitioner seeking postconviction DNA testing is less than the burden that he faces after test results have been obtained.

AUTHOR:
Justice Tom Chambers

WE CONCUR: